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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA PATRICK MURPHY,

Defendant and Appellant.

C084973

(Super. Ct. Nos. CM039312,
CM040103)

Appointed counsel for defendant Joshua Patrick Murphy asks this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Finding no arguable error that would result in a disposition more favorable to defendant, we will affirm the judgment.

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

BACKGROUND

Defendant purchased an illegal assault rifle online from a store in Kansas and had it delivered to a sporting goods store in Paradise. On September 13, 2013, he was

arrested after trying to pick up the assault rifle at the store. Two searches of his residence pursuant to separate search warrants found firearms, ammunition, and a micro SD card containing images of child pornography.

Defendant pleaded no contest to possession of a large capacity magazine, a felony (Pen. Code, § 32310)¹ and possession of child pornography (§ 311.11, subd. (a)). The trial court suspended imposition of sentence and placed him on four years' formal probation subject to various conditions, including not to have contact with various individuals including Sierra A., to comply with any existing no contact orders, and to participate in electronic monitoring pursuant to section 1210.7.

Following a contested hearing, defendant subsequently was found in violation of his probation after he was seen in the presence of Sierra A. while not wearing his ankle monitor. The trial court terminated probation, sentenced defendant to two years eight months in state prison, imposed various fines and fees, and awarded 141 days of presentence credit (71 actual and 70 conduct).

DISCUSSION

Counsel filed an opening brief setting forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.)

Defendant filed two supplemental briefs. He first contends the trial court erred in finding that he violated his parole by having contact with Sierra A., asserting the People failed to show a need for the protective order he violated, there was no evidence of a no contact order between defendant and Sierra A., the condition conflicted with the free exercise of his religion by keeping him from contacting Sierra A., and the condition was invalid.

¹ Undesignated statutory references are to the Penal Code.

Defendant's arguments go to the underlying validity of the probation condition. Pursuant to section 1237, subdivision (a), a defendant may appeal from an order granting probation. "In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation. [Citations.]" (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) Defendant did not contest the validity of his probation conditions in his appeal from the order granting probation and is therefore foreclosed from doing so in this appeal.

Defendant next contends he was entitled as a matter of due process to a jury trial and the proof beyond a reasonable doubt standard for the probation violation allegations. Probation revocation proceedings are not criminal proceedings, and therefore are not subject to a jury trial or the proof beyond a reasonable doubt standard. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435, fn. 7 [79 L.Ed.2d 409, 425]; *People v. Benitez* (2005) 127 Cal.App.4th 1274, 1278.) Defendant's claim to the contrary is without merit.

Defendant asserts the fifth probation revocation allegation, that he terminated participation in the probation department's electronic monitoring program without the permission of the court or the probation officer, is invalid because, under the separation of powers doctrine, the probation department did not have the authority to require him to wear a tracking monitor. Section 1210.12, subdivision (a) provides in pertinent part: "A county chief probation officer shall have the sole discretion, consistent with the terms and conditions of probation, to decide which persons shall be supervised using continuous electronic monitoring administered by the county probation department." To the extent section 1210.12 "purports to deprive the trial court of the authority to decide who should be subject to GPS monitoring, it violates the separation of powers." (*People v. Cruz* (2011) 197 Cal.App.4th 1306, 1311.) However, there is no separation of powers problem

provided that the trial court agrees with the probation department's decision. (*Id.* at p. 1310.) Here, the trial court ordered defendant to be placed on electronic monitoring when it made that a condition of probation, so there is no separation of powers issue.

Defendant's fourth contention is that his trial counsel was ineffective in failing to request his crimes be reduced to misdemeanors pursuant to section 17 when probation was granted. As with defendant's first contention, this goes to a claim he could have but did not make in his appeal from the order granting probation, and therefore cannot be raised in this appeal.

Next, defendant contends the trial court erred in denying him a stay of execution to post bail pending appeal. "Appellant also included in his brief arguments that the trial court erred in denying bail and stay of execution pending appeal. The appropriate procedure for challenging these decisions is by writ of habeas corpus or an application for bail pending appeal under rule [8.312] of the California Rules of Court. To include them in the brief on appeal is pointless, since they will be mooted whether the conviction is affirmed or reversed. We have therefore given no consideration to these arguments." (*People v. Lowery* (1983) 145 Cal.App.3d 902, 904.) The same applies here.

Defendant also contends that he cannot be ordered to pay a fine or fee because Article I, section 10 of the United States Constitution mandates the payment of debt in gold or silver coin, and U.S. currency is no longer backed by either metal. Article I, section 10 provides that no state shall "make any thing but gold and silver coin a tender in payment of debts" Federal law provides that "United States coins and currency . . . are legal tender for all debts, public charges, taxes, and dues." (31 U.S.C. § 5103.) While Article I, section 10 prohibits California from mandating a form other than gold or silver for the payment of debts, it does not prevent Congress from so doing, which it has done. Defendant's fines and fees are valid.

In his second supplemental brief, defendant first asserts he was denied his right to allocution. In California, the right of allocution is codified in sections 1200 and 1201.

(*People v. Cross* (1963) 213 Cal.App.2d 678, 681 & fn. 3.) Section 1200 provides that a criminal defendant be arraigned before sentencing, and be asked “whether he has any legal cause to show why judgment should not be pronounced against him.” Section 1201 reads: “He or she may show, for cause against the judgment: [¶] (a) That he or she is insane [¶] (b) That he or she has good cause to offer, either in arrest of judgment or for a new trial” Implicit in this inquiry is a right of the defendant to respond. Since the statute limits allocution to this formal inquiry, any further opportunity for the defendant to personally address the court at sentencing is at the discretion of the court. (*Cross*, at pp. 681-682.) Thus, it has been held repeatedly that where a defendant is represented by counsel, the trial court need only give counsel an opportunity to address the court before sentencing. (See *People v. Sanchez* (1977) 72 Cal.App.3d 356, 359; *People v. Wiley* (1976) 57 Cal.App.3d 149, 166, disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10; *People v. Cross*, *supra*, 213 Cal.App.2d at pp. 681-682.)

Before imposition of sentence, the trial court asked counsel if there was “[a]ny legal reason or cause why judgment and sentence cannot be pronounced?” Defense counsel said there was none, and the trial court proceeded to impose sentence. Following the imposition of sentence, the matter was trailed for a *People v. Marsden* (1970) 2 Cal.3d 118 hearing. At the *Marsden* hearing, defendant asserted that he wanted an allocution and could not get his attorney to understand this. Trial counsel then told defendant the court would let him say what he wanted on the record before the final passage of judgment but it could not be too long. Following the denial of the *Marsden* motion, the trial court awarded presentence credits, addressed counsel’s arguments concerning the previously imposed fines and fees, and terminated proceedings without allowing defendant the opportunity to speak.

Defendant's right to allocution was properly waived by counsel. He was not entitled to further allocution, notwithstanding trial counsel's statement at the *Marsden* hearing.

Defendant next argues a fine rather than a prison sentence should have been imposed because the stigma associated with his crime places him at risk in prison. Possession of a large capacity magazine is punishable by a misdemeanor county jail term or a felony sentence under section 1170, subdivision (h). (§ 32310, subd. (a).) Possession of child pornography is punishable by a state prison sentence, a county jail term for up to a year, by a fine, or by a fine and imprisonment. (§ 311.11, subd. (a).) The sentence imposed was well within the trial court's discretion. Any concerns defendant has regarding his safety while incarcerated are not properly before us.

Defendant raises various constitutional attacks regarding his large capacity magazine offense. These arguments could have been made in the appeal from his initial conviction but were not, so are forfeited.

Defendant's final contention raises general claims regarding the competency of trial counsel, appellate counsel, and the trial court. Our review of the record shows his claims are unfounded.

Having undertaken an examination of the record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

MURRAY, J.

DUARTE, J.